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No. 99-1052

Supreme Court, U.S.
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

WILLIAM P. VERKIN,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER WILLIAM P. VERKIN'S REPLY BRIEF

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Reply Brief

The Government's brief in opposition effectively concedes:

1. The indictment (App. E-1) does not allege, either directly or by implication, that Verkin knowingly misrepresented the appraised value of the land to the credit union.

2. In the first trial, the Government introduced no evidence, and made no argument, that Verkin knowingly misrepresented the appraised value of the land to the credit union.

3. On the first appeal, the Fifth Circuit rejected virtually all of the Government's case as it was then presented, holding that "[t]he appraised value of the [land] was accurately revealed and well in excess" of the amount necessary to secure the loan (App. C-1, 14).

4. The Government did not inform Verkin and his counsel that it would rely for conviction on the previously undisclosed accusation concerning the appraised value of the land until the morning the second trial began, almost four years after the return of the indictment.

5. The trial judge overruled Verkin's timely Fifth and Sixth Amendment objections to being tried on the previously undisclosed accusation concerning the appraised value of the land (Supp. R. 2: 138-42; R. 2, Tab 317, April 27, 1998).

6. The trial judge refused Verkin's timely request for a brief continuance, to allow him to attempt to gather evidence to rebut the accusation concerning the appraised value of the land (R. 2: Tabs 325, 327, May 4, 1998).

7. The Government urged the jury to find Verkin guilty on the basis of the accusation concerning the appraised value of the land (Supp. R. 12: 192).

8. The Court of Appeals affirmed Verkin's convictions for conspiracy and bank fraud, solely upon the accusation concerning the appraised value of the land, without deciding whether the evidence was insufficient to support the other accusations that were actually made in the indictment (A-1, 3-4).

In view of these undisputed circumstances, the Government's extended summary of the indictment in its reply is largely irrelevant. In the first appeal, the Fifth Circuit rejected virtually all of the allegations in the indictment concerning the supposed "sham joint venture," "skimming," and "kickbacks," the crux of the conspiracy and bank fraud counts. In the second appeal, the panel did not even consider those issues, instead affirming the convictions solely on an alternative allegation that Verkin "participated in a misrepresentation of the appraised value of the land" (A-1, 4) — an accusation the indictment never made.

The Government's suggestion that the questions in the petition are "highly fact-bound" also misses the mark. Verkin does not ask this Court to evaluate the claimed insufficiency of the evidence, apart from the purported misrepresentation concerning the appraised value of the land. That should be left to the Court of Appeals, following remand.

Rather, the issues presented are whether two serious federal criminal convictions can be sustained, solely on the basis of an accusation that was never made in the indictment, and of which the defendant and his counsel were given no fair notice before the trial began. The legitimacy and importance of those questions are apparent from the face of the record. They are appropriate for review under Supreme Court Rule 10.

Verkin's indictment "cannot fairly be read as charging" the conduct eventually relied upon by the Court of Appeals to sustain his convictions. *Stirone v. United States*, 361 U.S. 212, 217 (1960). Misrepresenting the appraised value of the collateral securing the loan was simply not the criminal conduct constituting the bank fraud and conspiracy offenses alleged in the indictment, just as interstate steel shipments were not alleged as criminal conduct by the indictment in *Stirone*.

Of course, Verkin's indictment need not have alleged, and the Government need not have disclosed prior to trial, all of the "evidentiary facts"

supporting its case. *E.g., United States v. Hajecate*, 683 F.2d 894, 898 (5 Cir. 1982); *United States v. Williams*, 679 F.2d 504, 508 (5 Cir. 1982), *cert. denied*, 459 U.S. 1111 (1983). Here, however, the indictment did not charge as criminal the only conduct relied upon by the Court of Appeals to sustain the convictions, thereby impermissibly allowing an indictment and conviction "to rest on one point and the affirmance of the conviction to rest on another." *Russell v. United States*, 369 U.S. 749, 766 (1962). Like Stirone, Verkin "was convicted on a charge the grand jury never made against him." *Stirone v. United States*, 361 U.S. at 219.

Nor is it at all significant, as the Government seems to think, that the trial court's jury instructions did not alter the indictment, make specific reference to real estate appraisals, or "[a]llow the jury to find a scheme larger than or different from the one charged in the indictment." *United States v. St. Gelais*, 952 F.2d 90, 94 (5 Cir. 1992). The issue here is not what the *jury* did, but what *the Court of Appeals* did. Even if the jury did not convict Verkin of knowingly misrepresenting the appraised value of the land to the credit union, the Court of Appeals *thought* it did, because that was its only basis for affirming the convictions. A criminal conviction cannot be sustained on a finding the jury never made.

Finally, the Government's arguments that Verkin was provided with fair notice of the accusations against him are singularly unpersuasive. The indictment did not charge that Verkin knowingly misrepresented the appraised value of the land, the only ground on which the convictions eventually were sustained. An accused cannot meaningfully be said to have had fair notice of "a charge that was never made." *Cole v. Arkansas*, 333 U.S. 196, 201 (1948).

Conclusion

Verkin asks that the Court grant certiorari; hold that the affirmance of Verkin's convictions on the grounds adopted by the Court of Appeals violated the Fifth and Sixth Amendments; and remand the case to the Court of Appeals, for a determination of whether the evidence is otherwise constitutionally sufficient to support the allegations in the indictment.

Respectfully submitted,

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